

## Internal Revenue Service

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## Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID

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CC:CORP:04

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Date: July 23, 2010

### Legend

Parent =

Exchange =

Company 1 =

Company 2 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

Date 10 =

Date 11 =

Year 1 =

Year 2 =

Year 3 =

Year 4 =

Year 5 =

A =

B =

C =

D =

E =

F =

G =

H =

I =

Dear :

We respond to your letter dated March 26, 2010, in which you requested rulings as to certain federal income tax consequences of the transactions discussed below. The information submitted in that letter and in later correspondence is summarized below.

The rulings contained in this ruling letter are based on facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed

by an appropriate party. This office has not verified any of the materials submitted in support of the request for rulings. Verification of the information and other data may be required as part of the audit process.

### Summary of the Facts

Parent is the common parent of an affiliated group of corporations that file a consolidated Federal income tax return (the "Parent Group," also referred to as the "Taxpayer").

Parent has authorized A shares of common stock (the "Common Stock"). On Date 1, Parent issued D shares of its Series C Preferred Stock (the "Preferred C") for \$E a share and received net proceeds of \$F. The Preferred C (i) is entitled to receive quarterly dividends; (ii) has an initial liquidation preference of \$E per share, subject to increase for accrued but unpaid dividends (the "Preferred C Liquidation Preference"); (iii) is non-voting, except in the event that the preferred dividends are in arrears for six or more quarterly periods; and (iv) is not convertible into or exchangeable for any other property, securities, or stock. Upon redemption, the Preferred C shareholders are entitled to receive an amount equal to the Preferred C Liquidation Preference. The Preferred C stock is not redeemable prior to Date 9. On or after Date 9, Parent, at its option and upon giving the required notice, may redeem the Preferred C, in whole or in part, for cash equal to the Preferred C Liquidation Preference.

Parent has been taxable as a Subchapter C corporation since Date 2. Prior to Date 2, Parent was taxed as a real estate investment trust ("REIT") under § 857. However, Parent's REIT status terminated retroactively to Date 2, at which time it became taxable as a subchapter C corporation as a result of its failure to meet the REIT distribution requirement for the tax year ended Date 3. The Parent Group has been a loss group within the meaning of Treas. Reg. § 1.1502-91(c)(1) since Date 4.

On Date 5, Parent issued G shares of its Series D Preferred Stock (the "Preferred D") to Company 1 and Company 2, for \$E a share, receiving net proceeds of \$H. The Preferred D (i) is entitled to receive daily dividends at a rate of 1% per annum; (ii) has an initial liquidation preference of \$E per share, subject to increase for accrued but unpaid dividends (the "Preferred D Liquidation Preference"); (iii) is convertible into the Common Stock; and (iv) is entitled to vote as one class with the Common Stock on an as-converted basis. No conversions have occurred with respect to the Preferred D since its issuance. The Preferred D shareholders are entitled to receive an amount per share equal to the greater of (a) the Preferred D Liquidation Preference, or (b) the amount entitled to receive upon its conversion to Common Stock.

Parent's only stock-based compensation plan is a Year 1 Incentive Stock Plan, under which Parent can issue options and stock awards to compensate the Parent Group's employees and other service providers. As of Date 8, all options had been

granted at exercise prices greater than or equal to the estimated fair value of the underlying stock at the date of grant. The outstanding options generally vest equally over four years and expire ten years after the date of grant. In addition, Parent has granted restricted stock in Year 3 that vests five years after its issuance. Parent did not grant restricted stock in either Year 4 or Year 5.

The Common Stock was publicly traded on Exchange through Date 6. However, the Common Stock was delisted from Exchange on Date 7 due to its declining trading price. Specifically, on Date 10, Parent had B shares of Common Stock outstanding with a closing trading price of \$C per share.

As a result of the Preferred D purchase on Date 5 (as previously described), both Company 1 and Company 2 became 5% shareholders of Parent within the meaning of § 382, and remain as the only two 5% shareholders.

Parent is contemplating a transaction in which all the outstanding Preferred C and Preferred D would be exchanged for Common Stock (the “Conversion Transaction”) based on conversion values negotiated at arm’s-length. It is the intention of all parties concerned that the Conversion Transaction will result in the holders of the Preferred C and Preferred D stock exchanging their respective shares for Common stock in a value-for-value exchange. It is expected that the Conversion Transaction will occur on or after Date 11, which is at least three years after the issuance of the Preferred D on Date 5.

Parent requests a ruling that for purposes of factoring out changes in the proportionate ownership of its stock that are attributable solely to fluctuations in the relative fair market value of different classes of stock under § 382(l)(3)(C), it be allowed to apply a reasonable method employing the Hold Constant Principle. Broadly stated, under the Hold Constant Principle, the value of a share, relative to the value of all other stock of the corporation, is established on the date that share is acquired by a particular shareholder. On subsequent testing dates, the percentage interest represented by that share (the “tested share”) is then determined by factoring out fluctuations in the relative values of the loss corporation’s share classes that have occurred since the acquisition date of the tested share. Thus, as applied, the Hold Constant Principle is individualized for each acquisition of stock by each shareholder. Moreover, the ownership interest represented by a tested share is adjusted for the dilutive effects of subsequent issuances and the accretive effects of subsequent redemptions following the tested share’s acquisition date.

### Representations

Taxpayer has submitted the following representations regarding its request:

1. Parent Group has been a loss group within the meaning of Treas. Reg. § 1.1502-91(c) since Date 4.

2. There have been no classes of Parent stock outstanding that constituted “stock” within the meaning of § 382(k)(6) and Treas. Reg. § 1.382-2(a)(3) at any time from Date 4 through the date of issuance of this ruling letter, other than the following: the Common Stock and the Preferred D.

3. The Preferred C satisfies all the requirements under § 1504(a)(4) and thus has not been treated as stock for purposes of the ownership shift computation of § 382.

4. Other than the shares of the Preferred D class issued on Date 5, Parent did not issue any additional shares of the Preferred D class or any rights to acquire shares of the Preferred D class.

5. Parent did not issue, nor did any Parent Group member issue, any contingent purchase, warrant, convertible debt, put, stock subject to a risk of forfeiture, contract to acquire stock, or option with a principal purpose of avoiding or ameliorating the impact of an ownership change.

6. To the best of Parent’s knowledge, the amount of tax liability on any of Parent’s federal income tax returns filed to date would not be affected by whether or not Parent takes into account the effect of fluctuations in the relative values of different classes of stock for purposes of determining owner shifts and ownership changes under § 382.

7. For purposes of identifying its direct shareholders or indirect owners who are 5% shareholders through reliance on the existence or absence of SEC filings under Temp. Treas. Reg. § 1.382-2T(k)(1)(i), Parent, to the best of its knowledge, has located all relevant SEC filings from Date 4 through Date 10.

8. The conversion terms in connection with the Conversion Transaction have been or will be negotiated in an arm’s-length transaction.

9. The Conversion Transaction will be undertaken as a value-for-value exchange of the Preferred C and Preferred D for Common Stock.

### Rulings

Based solely on the information submitted and representations made, we rule as follows:

(1) For purposes of factoring out changes in the proportionate ownership of Parent’s stock that are attributable solely to fluctuations in the relative fair market value of different classes of stock under § 382(l)(3)(C), Parent may apply a reasonable method employing the Hold Constant Principle to determine the increase in percentage

ownership of each of its 5% shareholders on each of its testing dates since Date 5 (and to identify which such testing dates are change dates for purposes of § 382), provided that Parent continuously employs such method in the applicable “consistency period” as defined in Notice 2010-50.

(2) In applying the Hold Constant Principle, a value-for-value conversion of the Preferred D into Common Stock shall be disregarded, and the exchanging shareholder shall be considered to have acquired such newly issued stock as of the date it acquired the stock exchanged therefore. The stock received in the exchange will also retain the same hold-constant characteristics as the surrendered shares (see Notice 2010-50).

### Caveats

Except as expressly provided herein, no opinion is expressed or implied about the federal income tax consequences of any aspect of any transaction or item discussed or referenced in this ruling letter. Specifically, no opinion is expressed as to whether: (i) any warrants or options should have been treated as exercised under Treas. Reg. § 1.382-4(d), (ii) Parent had a testing date on any given date, and (iii) any exchange of stock pursuant to the Conversion Transaction will represent a value-for-value exchange. Furthermore, no opinion is expressed as to whether the Preferred C constitutes stock within the meaning of § 1504(a)(4). One or more rulings covered in this ruling letter deal with issues that may be addressed in subsequent published guidance. See section 11 of Rev. Proc. 2010-1, 2010-1 I.R.B. 1, 47-51, regarding the circumstances, including published guidance, which may result in the revocation or modification of a ruling letter.

### Procedural Matters

This ruling letter is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any federal income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of this letter.

In accordance with the power of attorney on file in this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

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Marie C. Milnes-Vasquez  
Senior Technician Reviewer, Branch 4  
Associate Chief Counsel (Corporate)